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No. 254.

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES,

Petitioners,

v.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT, A CORPORATION.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

AMICUS CURIAE

BRIEF ON BEHALF OF THE SWISS NATIONAL INSURANCE COMPANY, LTD.

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The purpose of this brief is to discuss a proposition of law involved in the decision of this case which also applies to a case now pending in the Supreme Court of the District of Columbia. There the Swiss National Insurance Company, Ltd., a Swiss corporation, is suing the Attorney

General and the Treasurer of the United States under the permission granted by Section 9 of the Trading with the Enemy Act, as amended, for the balance of the eighty percent of its property returnable to it under the Settlement of War Claims Act and Section 9 of the Trading with the Enemy Act, as amended. In that case the formal consent of the claimant to the retention of twenty percent of the seized funds has been executed and filed as required by law. The suit was commenced before the enactment of Public Resolution No. 53.

In the instant case the court below reached the conclusion (among others), that the Act restoring the appellant's property established a vested right in appellant (respondent here), which was not affected by the subsequent passage of Public Resolution No. 53. Upon this point we have nothing to add to the brief filed in this court on behalf of respondent.

The court below also concluded that by the terms of subdivision (m) of Section 9 of the Trading with the Enemy Act, as amended, the United States had consented to be sued in cases involving the return of property under Section 9 and "that it never had withdrawn its consent." While we are entirely in accord with this construction of Public Resolution No. 53, it left out of consideration one phase of the question involving the remedy which may come before this court for determination.

The court of first instance held that the effect of the Resolution was to withdraw the consent of the United States to be sued. With this conclusion the Court of Appeals disagreed and as a consequence the power of the Congress to withdraw the right to sue was not dwelt upon. That question becomes of first importance if this court should agree with the Supreme Court of the District and construe Public Resolution No. 53 as deliberately intended by Congress to withdraw the right to sue, or to abate or suspend that right, even though suits had been

instituted, and were still pending at the time the Resolution was drafted.

This argument is addressed to the single question whether under our system of constitutional government the Congress may abate or impair the remedy previously authorized by Congress where there is a vested property right in the claimant protected by the Fifth Amendment to the Constitution, and where the owner of this right has already commenced a suit in a Federal Court against the officials of the Government in control of the funds as prescribed by the Act of Congress ordering the return of the property.

Our contention is that:

The power of Congress to revoke or withdraw a right to sue the Government or its officials does not extend to suits brought to enforce rights which have vested, and are therefore within the protection of the Fifth Amendment.

In announcing the decision of a majority of this court in *United States* v. *Lee* (106 U. S. 196, 207), Mr. Justice Miller said:

> "While the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time (the date of the announcement of the decision of the Supreme Court in Cohens *v.* Virginia, 6 Wheat. 264—March 3, 1921) been repeatedly asserted here, the principle has *never been discussed or the reasons for it given*, but it has always been treated as an established doctrine." (Italics ours.)

This decision was announced in 1882. An examination of the cases decided since then, involving sovereign immunity, reveals, with few exceptions, the same absence of discussion of either the legal or historical basis for this oft reiterated aphorism.

The great body of our common law was drawn from England, and it is quite natural that our legal vocabulary

coming from the same source should be given definitions also drawn from that source. Hence the word "sovereign" as applied to the *Government* of the United States was from the earliest days given the same meaning as that ascribed to it by the English authorities in referring to their King, Lords and Commons. But the English conception of sovereignty is misleading when applied to our form of government.

At the time of, and before the American Revolution, the Parliament of Great Britain, in its three-fold combination of King, Lords and House of Commons, was the actual sovereign, the first two in their own right, and the last in its representative capacity. They were bound by no rules, regulations or limitations imposed by a superior authority. A rule or law or statute created by their joint consent was absolute and binding throughout the realm. Life and property could be taken and prior laws annulled at the will of this tripartite sovereignty. The only protection of the British subject under the English form of government consisted in certain unwritten rules, not of "positive law" but of "positive morality", which in the aggregate are often referred to as "the British Constitution." These rules Parliament has seen fit to follow and be guided by for so long a period that they have come to be considered as morally and ethically binding upon it; but there is no legal control and Parliament may discard or disregard any or all of them at will.

Turning to our own country, the transitory period between the Declaration of Independence and the adoption of the Federal Constitution, is of some interest in this discussion, as bearing upon the Constitution drafted by the Convention of 1787 and the Bill of Rights appended thereto in the form of the first ten amendments. An interesting treatment of this phase of the political development of the country is contained in Professor Burgess' Work on Political Science and Constitutional Law (Vol. I, Chap. 2). It is quite clear from the history of that period,

that the Colonies had become a "State" as that term is used in political science, upon the severance of the ties which had theretofore bound them to the Mother Country. The difficulties which led to the adoption of the Federal Constitution resulted from a clash between the several emancipated Colonies and the Central Government that had been established under the Articles of Confederation, as to the distribution and exercise of the sovereign powers inherent in the newly created "State" or "Nation", as between state and national governments.

By the adoption of the Constitution and the establishment of the Federal Government, the demarcations between the national Government and the Governments of the several states were more clearly defined, but the ultimate national sovereignty continued to rest in the people as a whole. As to those powers expressly delegated by the people to the executive and legislative arms of the Federal Government, that Government is undoubtedly supreme; but as to the powers which are reserved to the people by the provisions of the Constitution, no analogy exists between the King, Lords and Commons of Great Britain and the President, Senate and House of Representatives of the United States. While the former were free and untrammeled, the latter are controlled and bound within the express powers delegated to or conferred upon them by the written provisions of the Constitution which emanated from the Sovereign People. That Constitution is the supreme law of the land—a law, as has been repeatedly held by this court, which can be violated by no act of Congress although concurred in by the President, Senate and House of Representatives.

Several reasons for the principle of sovereign immunity from suit have been given by courts and writers on political science. In England it has been explained on the theory that all process is issued and served by the King, and it would be absurd for the King to serve himself.

Another reason advanced both in England and here is that to hold otherwise would be to subject the Government to endless litigation, resulting in a serious interference with its proper functioning. Mr. Justice Miller in *United States* v. *Lee* (*supra*), after quoting language from the opinion of Mr. Justice Gray of the Supreme Court of Massachusetts in *Briggs & Another* v. *Light Boats,* (11 Allen [Mass.] 157), to the effect that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the soveriegn to subject him to repeated suits as a matter of right, at the will of any citizen, said at page 206:

> "As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests."

The rule of sovereign immunity from suit stands on firmer ground. It is predicated upon a supreme power to make, revoke, alter and amend all law, which by necessary implication includes the power to refuse to submit to legal process unless consented to. Mr. Justice Holmes put it tersely in *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353, where he states:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that *there can be no legal right as against the authority that makes the law on which the right depends.*" (Italics ours.)

Accepting this as the basis of sovereign immunity, let us apply it as a test to the instant case. Here the law upon which the respondent (plaintiff below) relies for its protection as the owner of a vested right, is not the law of Congress under the terms of which a part of its property was to be returned to it upon certain conditions, but the provision of the Constitution which protects its vested

rights. That law emanates not from Congress but from the Sovereign People of the United States who created and controlled Congress. The power to destroy or impair this right lies not with Congress, but rests in the people themselves; and its destruction or impairment in accordance with the principle enunciated by Justice Holmes may be accomplished only by proper amendment, by the Sovereign People, of the organic law which they made and which they have declared to be "the supreme law of the land."

Our courts have not hesitated to declare invalid acts of Congress which attempt directly to impair or destroy rights, the protection of which is guaranteed by the Constitution. How can an attempted impairment or destruction of such rights be justified when it is sought to be accomplished not directly, but indirectly by the withdrawal, impairment or suspension of the right to recover and collect a judgment for the amount ordered to be returned to it, and to which it is now entitled.

In *Bronson* v. *Kinzie* (1 How. 311, 317), the court said:

> "But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

And again:

> "In vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

It is no answer to say that by the provisions of the Constitution, with the exception of the original jurisdiction in certain cases conferred upon the Supreme Court by that instrument, the duty to create tribunals and to

prescribe their jurisdiction and procedure is placed upon the Congress. If they had failed in that duty the remedy was in the electors.

Our question here is a different one. Congress under the power granted them passed a law, under the terms of which a German, by the execution and filing of a certain instrument, could acquire a vested right in and the return of a part of the property which had belonged to him, and which had been seized by the United States under its war powers. Congress went further, and by Section 9 of the Trading with the Enemy Act, as amended, expressly gave him the right to sue the United States officials who were in possession and control of such property, should they refuse to deliver the same. It now attempts to withdraw that right and by such withdrawal, even if only temporary, the right is impaired, and, if permanent, it is practically destroyed.

By the terms of the resolution the right to recover these funds is suspended (subject to voluntary executive action) so long as the German Government shall fail to fulfill certain treaty obligations involving the payment of large sums of money. That such a suspension is tantamount to a destruction of the right, no one who is familiar with the present European conditions and with the history of the past few years can doubt.

An examination of the cases dealing with sovereign immunity indicates a growing doubt in the minds of our judges as to its universal application to the acts of Congress. In *Choate* v. *Trapp* (1912), 224 U. S. 665, 671, this court said:

> "* * * there is a broad distinction between * * * the power to abrogate a statute, and the authority to destroy rights acquired under such law."

A decision of Judge Julian W. Mack sitting in the District Court for the Southern District of New York, in a camparatively recent case (*The Pesaro,* 277 Fed. 473, 474,

[1921]), wherein the question of sovereign immunity entered, reflects the leaning of our courts towards placing limits upon the doctrine. The learned Judge after an exhaustive examination of the authorities said:

> "While the principle has been fervently defended by some jurists as vital and fundamental to sovereignty * * * the extent to which it has been carried or retained in modern law has been the subject of strong criticism * * * and there is observable a tendency to restrict its application or to guard against its extension. * * *
>
> "Where the application of the doctrine is not clear, a solution is not to be found by reference to strict Austinian theory which assumes by mere definition, that the sovereign is not subject to his own laws. Nor is it to be found by uncritical reference to historical origins. The reasons which in the past led to the exemption of the sovereign from suit may or may not justify the extension of the principle in modern law."

It is interesting to note the pains to which our judges have gone in reiterating the immunity rule as a fundamental principle of our law, and at the same time avoiding the consequences of its application in cases where such application would work injustice.

In only one case (*Filbin Corporation* v. *United States* [1920], 266 Fed. 911), do we find any attempt to examine into the source of the principle of sovereign immunity and the extent of its application to our form of government. The District Judge in that case, while admitting the general recognition of the doctrine by our courts, after a brief but masterly analysis of its historical derivation, denies its application in this country where vested rights have been infringed.

One of the earliest cases was *United States* v. *Clarke* (8 Peters, 436 [1834]), decided by Chief Justice Marshall. There a grantee from the Spanish Crown of lands in Florida prior to its cession to the United States sued

for its enforcement. The court while holding that the United States was not suable of common right and that the party to a suit against them must bring his case within the authority of some act of Congress, *held* that the law which conferred jurisdiction upon the Superior Court of East Florida of "all remaining cases which have been presented according to law and not finally acted upon" was sufficiently broad to give to that court jurisdiction of the case.

One line of authorities while denying the right of suit against the Government permits the action to be brought against governmental agents whose acts were directly responsible for the situation out of which the suit arose.

Meigs v. *McClung*, 9 Cranch, 11 (1815);
Carr v. *United States*, 98 U. S. 433 (1878);
United States v. *Lee*, 106 U. S. 196 (1882);
Belknap v. *Schild*, 161 U. S. 10 (1895);
Philadelphia Co. v. *Stimson*, 223 U. S. 605 (1911).

Another line of cases, mostly in Admiralty, hold that while the Government cannot be recovered against if the proceeding is *in rem*, the immunity does not prevent a lien attaching to the *res* which is the subject matter of the action, nor the enforcement of that lien by its owner against the rights of the United States Government in the same *res*.

United States v. *Wilder*, Federal Cases No. 16694 (1838);
The Siren, 7 Wall. 152 (1868);
The Davis, 10 Wall. 15 (1869).

The authorities cited below hold that the rule of Government immunity does not apply where the Government with respect to the transaction in question is acting not in a governmental but in a commercial capacity.

The Pesaro, 277 Fed. 473 (1921);
Rosenberg Bros. v. *United States Shipping Board Emergency Fleet Corp.*, 295 Fed. 372 (1923).

In *Oak Worsted Mills* v. *United States,* 36 Fed. (2d) 529 (1929), the case while reiterating the doctrine of sovereign immunity from suit, held that there was no vested right in question.

Perhaps no authority has been cited oftener than *De Groot* v. *United States* (5 Wall. 419). De Groot entered into a contract with the United States to furnish it with a large quantity of bricks. There was some delay in the work and De Groot having laid out a good deal of money in his enterprise, which included the purchase of a large brickyard, applied to Congress for relief. Congress passed a Joint Resolution authorizing the Secretary of the Treasury to settle De Groot's claim on *principles of justice and equity,* provided there should be a surrender to the United States of all the brick made, all the machinery and appliances and other personal property, and that the contract be cancelled. After the passage of this resolution De Groot deeded to the United States all the brick made, together with all the machinery and appliances and other personal property, and leased the brickyard, sheds, etc. for a period of ten years until the completion of the work. Thereafter the Secretary of the Treasury awarded him $29,000. De Groot received a part of this award but being dissatisfied with it as too small, again petitioned Congress. Thereupon that body passed another resolution directing the Secretary of War to settle the account on principles of justice and equity. Under this resolution the Secretary of War made an award showing a balance due De Groot of over $100,000. This award for some reason was not paid. Thereafter Congress passed another Joint Resolution repealing the prior Resolution and directing that the papers be transmitted by the Secretary of War to the Court of Claims for adjudication. In that court De Groot, submitting to its jurisdiction, filed his petition and asked that the amount found to be due him by the award of the Secretary of War be paid him.

The Court of Claims held that under the language of the last Resolution it could not consider the award but that

its only jurisdiction lay in an examination of the claim *de novo*. That contention was sustained by this court.

It is difficult to spell out of these rather complicated facts any vested right in De Groot. The terms of the conveyance of the brick, etc. under the first Joint Resolution are not in accordance with the terms of the Resolution itself, as that called for a transfer of title and a lease was substituted for a deed. The case apparently turned upon the terms of the Resolution of Congress conferring jurisdiction of the case upon the Court of Claims. De Groot submitted to this jurisdiction by filing his petition, and the only question apparently considered by the Court of Claims was whether it could act upon the award made by the Secretary of War, or whether they should consider the claim *de novo*. This was a narrow question of construction of a resolution and had nothing to do with the impairment of a vested right. It may well be that if De Groot had refused to submit to the jurisdiction of the Court of Claims and had sued in a court of general jurisdiction upon the award, the result might have been different. The power of Congress to impair a vested right as we read the decision was not involved.

Smallwood v. *Gallardo* (1927), 275 U. S. 56, 61, involved the constitutionality of an Act of Congress prohibiting suits to enjoin the collection of taxes imposed by the laws of Porto Rico. The petitioner claimed that the law was retroactive and that it took away a vested right. This court *held* first, that the law was not retroactive; and secondly, that there is no vested right to an injunction against the collection of illegal taxes. In this connection the court used the following significant language:

> *"This statute is not like a provision that no action shall be brought upon a contract previously valid, which in substance would take away a vested right if held to govern contracts then in force."* (Italics ours.)

The clear implication is that there is a limit to the control of Congress over the jurisdiction and procedure

of the lower courts and that that limit has been passed when a withdrawal of a remedy interferes with a vested right protected by the Constitution.

One other case invites comment. In *Lynch* v. *United States* (1934), 292 U. S. 571, the act of Congress which repudiated its obligations under war risk insurance contracts was challenged as an invasion of the vested rights of the petitioner.

While again proclaiming sovereign immunity from suit, this court held the law to be invalid as an infringement of vested rights. In dealing with the withdrawal of the right to sue the court said (p. 583):

> "The question requiring decision is, therefore, whether in repealing 'all laws granting or pertaining to yearly renewable term insurance' Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States. As Congress took away the contractual right it had no occasion to provide for withdrawal of the remedy. Moreover, it appears both from the language of the repealing clause and from the context of § 17 that Congress did not aim at the remedy. The clause makes no mention of consent to sue. The consent to sue had been given originally by § 405 of the Act of 1917, which, like the later substituted sections, applied to all kinds of insurance, making no specific reference to yearly renewable term policies. Obviously, Congress did not intend to repeal generally the section providing for suits."

And again (p. 587):

> "But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized that these had contractual rights."

In the instant case, there is no specific rescission of Section 9 of the Trading with the Enemy Act and no express prohibition against suits. If Joint Resolution No. 53 is to be construed along similar lines with the act under consideration in the *Lynch* case, it is difficult to escape the conclusions reached by the court below. If it is held that the effect of the Joint Resolution is to withdraw the remedy, we are face to face with the proposition, in view of the broad language of the *Lynch* decision, that Congress has the power under the Constitution to destroy a vested right by indirection, to wit: the rescinding of the only procedure by which that right can be enforced.

It is difficult to reconcile such a conclusion with the language of this court in *Bronson* v. *Kinzie* (*supra*):

> "In vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

A reconsideration and further demarcation by this court of the limits to be placed upon the application of the doctrine of sovereign immunity under our form of government is of wider interest than attaches to the rights of a few German nationals seeking to recover a part of their property which had been seized under the war powers of this Government.

One of the necessary consequences of the prodigious development and spread of the administrative machinery of our Government during the last few years is that *quasi* judicial powers are entrusted to Government officials or to boards and commissions instituted under a multitude of Federal statutes. These instruments of the executive are constantly called upon to take action affecting contractual and other vested rights of our own citizens, which are intended to be protected by the Fifth Amendment and

other provisions of our Constitution. That protection may amount to nothing if it is within the power of Congress to withdraw the right to appeal to our courts, thereby giving binding effect to the acts of the executive branch of our Government.

Respectfully submitted,

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REBUTTAL BRIEF FOR THE RESPONDENT

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REBUTTAL BRIEF FOR THE RESPONDENT

Preliminary Statement

This brief is filed, pursuant to permission of the Court in rebuttal to the reply brief of the petitioners served on the morning of the first day of the argument.

To recapitulate the respondents' general argument: While Congress has from the beginning recognized a beneficial interest of the Germans in the property seized, the Trading with the Enemy Act under which the property was